Kim Dockstader, ISB No. 4207
Gregory C. Tollefson, ISB No. 5643
STOEL RIVES LLP
101 South Capitol Boulevard, Suite 1900
Boise, ID 83702-5958
Telephone: (208) 389-9000
Facsimile: (208) 389-9040
kdockstader@stoel.com
gctollefson@stoel.com

Attorneys for Defendant Micron Electronics, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

KIMBERLEY SMITH, MICHAEL B. HINCKLEY, JACQUELINE T. HLADUN, MARILYN J. CRAIG, JEFFERY P. CLEVENGER, and TIMOTHY C. KAUFMANN, individually and on behalf of those similarly situated,

Plaintiffs,

vs.

MICRON ELECTRONICS, INC., a Minnesota corporation,

Defendant.

Case No. CIV 01-0244-S-BLW

DEFENDANT MICRON ELECTRONICS, INC.'S MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT RE: WILLFULNESS

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ORIGINAL

Defendant Micron Electronics, Inc. ("MEI" or "Defendant"), by and through its attorneys, Stoel Rives LLP, and pursuant to Federal Rule of Civil Procedure 56(b), respectfully submits this Memorandum in Support of Cross-Motion for Partial Summary Judgment Re: Willfulness.

I. INTRODUCTION

Plaintiffs have the burden of establishing that MEI's conduct was willful if Plaintiffs wish to use the three-year statute of limitations for their FLSA claim, and Plaintiffs have failed to allege any facts sufficient to meet their burden. Therefore, MEI is entitled to summary judgment on this issue as a matter of law.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs initiated this suit as a collective action pursuant to the Fair Labor Standards Act (FLSA) on behalf of themselves and other inside sales representatives employed by various MEI subsidiaries. Plaintiffs initially alleged in their complaint that MEI "unlawfully (1) induced employees to work off the clock, (2) implicitly and explicitly allowed managers to alter employee timecards, (3) failed to calculate overtime pay accurately, (4) discouraged employees from keeping accurate time records, and (5) suppressed wage claims." (Second Amended Complaint and Demand for Jury Trial (Docket No. 94) ¶ 2.)

Subsequently, Plaintiffs have admitted that (1) MEI *did*, in fact, include Plaintiffs' commissions in its overtime calculations and (2) Plaintiffs' time cards were *not* altered as originally alleged. (*See* Plaintiffs' Non-Opposition to Motion for Partial Summary Judgment on Payment of Premium on Commission Statements (Docket No. 222); Plaintiffs' Statement of Non-Opposition to Motion for Partial Summary Judgment Re: Plaintiffs' Claims of Altering Employees' Timecards (Docket No. 237).)

Based in part on the initial allegations in the Second Amended Complaint, the Court ordered a two-step FLSA class-certification process. At the preliminary stage and under a lenient standard, the Court conditionally certified the class and allowed Plaintiffs to send notice of the suit to other potential class members. (September 27, 2002 Memorandum Decision and Order (Docket No. 155).) In the second phase of certification, the Court will take a hard look at those Plaintiffs and claimants who have opted to join the lawsuit and will determine whether they are, in fact, truly "similarly situated." (*Id.*)

The discovery deadline for class-certification issues was May 3, 2004. (May 23, 2003 Scheduling Order and Referral to Magistrate Judge (Docket No. 166).) On June 17, 2004, MEI filed a motion for partial summary judgment regarding statutes of limitation. (Defendant Micron Electronics, Inc.'s Motion for Partial Summary Judgment Re: Statutes of Limitation (Docket No. 193).)

Plaintiffs first responded to that motion with an opposition brief filed on July 14, 2004. (Plaintiffs' Brief in Opposition to Defendant's Motion for Partial Summary Judgment Re: Statutes of Limitation ("Opposition Brief") (Docket No. 219).) The Opposition Brief argued that summary judgment was premature, because the Court had not yet decided whether the two- or three-year limitations period applied. (*Id.*) Two days later, on July 16, 2004, Plaintiffs filed a motion for partial summary judgment regarding: (1) liquidated damages pursuant to 29 U.S.C. § 216(b), (2) the alleged willfulness of MEI's conduct pursuant to 29 U.S.C. § 255(a), and (3) treble damages under I.C. §§ 45-614 and 45-615. (Plaintiffs' Motion for Partial Summary Judgment (Docket No. 223).)

The willfulness issue determines which statute of limitations to apply. Under the FLSA, the limitations period to recover unpaid overtime compensation is two years, unless the alleged

violation is deemed "willful" -- in which case the limitations period is extended to three years. 29 U.S.C.A. § 255(a).

In apparent ignorance of the burden of proof, Plaintiffs allege they are entitled to summary judgment regarding willfulness, "[b]ased on the lack of facts discovered to date which in any way would demonstrate that MEI did anything but flagrantly ignore the FLSA's requirement to pay its sales representatives overtime." (Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment ("Supporting Brief") (Docket No. 224) at 6.) In conjunction with this baseless statement, Plaintiffs' Statement of Undisputed Facts ("Plaintiffs' Statement of Facts") sets forth four purported "facts": (1) Marvin Masteller's pay status was converted from salary to hourly wages and he was told that he would not be paid for overtime work; (2) employees worked off the clock and were not paid for that time; (3) employees were told that they would not be paid for off-the-clock work; and (4) employees' supervisors knew that they were working off the clock. (Docket No. 225.)

These alleged "facts" are not really facts at all but consist of unsupported allegations colored by argument and inadmissible opinion and speculation (more fully described in the motion to strike filed contemporaneously herewith). Furthermore, these allegations are insufficient to establish a willful violation of the FLSA, and entitle MEI to summary judgment that only the two-year FLSA statute of limitations should apply.

III. ARGUMENT

MEI is entitled to summary judgment on the issue of willfulness, because Plaintiffs have failed to meet their burden and put forth evidence that MEI willfully violated the FLSA. To establish a willful violation of the FLSA, Plaintiffs first must set forth evidence of conduct giving rise to liability and such conduct must be deemed willful. Further, because this action

was filed as an FLSA collective action, Plaintiffs must demonstrate that any such willful violation stemmed from a common policy or plan that somehow affected all of them. Because Plaintiffs have failed to put forth any facts demonstrating a willful and commonly experienced FLSA violation, MEI is entitled to summary judgment on this issue.

Under section 216(b) of the FLSA, Plaintiffs may initiate a collective-action lawsuit, provided that they are "similarly situated." 29 U.S.C. § 216(b). For FLSA claimants to meet the "similarly situated" standard, courts require that the FLSA claims stem from the same nexus of fact or "a common policy or plan that violated the law." *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997); *see also Bayles v. Am. Med. Response of Colo., Inc.*, 950 F. Supp. 1053, 1066 (D. Colo. 1996); *Brooks v. BellSouth Telecommunications, Inc.*, 164 F.R.D. 561, 566 (N.D. Ala. 1995).

Moreover, in order to demonstrate that the three-year statutory limitations period applies, Plaintiffs must demonstrate that any such unlawful common policy or plan was also willful. The Court "will not presume that conduct was willful in the absence of evidence." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908 (9th Cir. 2003).

For statute of limitations purposes, an employer's conduct is "willful" if the employer knew that, or showed reckless disregard for whether, its conduct violated the FLSA. *Alvarez*, 339 F.3d at 909. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134 (1988). Reckless disregard is shown when an employer takes "no affirmative action to assure compliance with [the FLSA requirements]." *Alvarez*, 339 F.3d at 909. Willfulness requires more than mere negligence. *McLaughlin*, 486 U.S. at 133. In other words, conduct that is unreasonable, but not reckless, is not willful. *Id.* at 135 n.13.

Plaintiffs have failed to meet their burden of establishing willfulness, because they have not demonstrated and indeed cannot demonstrate that MEI willfully violated the FLSA. Not only have Plaintiffs failed to demonstrate a common policy or plan in violation of the FLSA (a prerequisite to finding a violation in the collective action context), but Plaintiffs have also failed to demonstrate any conduct that might be considered "willful" under 29 U.S.C.A. § 255(a).

As a preliminary matter, Plaintiffs' Supporting Brief ignores that Plaintiffs have the burden of proof. The Supporting Brief states, "Based on the lack of facts discovered to date which in any way would demonstrate that MEI did anything but flagrantly ignore the FLSA's requirement to pay its sales representatives overtime, Plaintiffs contend that the Court should find that MEI willfully violated the FLSA." (Supporting Brief at 6.) Certainly that is not sufficient to carry the movant's burden on summary judgment.

Moreover, even looking to Plaintiffs' Statement of Facts, Plaintiffs fail to allege facts sufficient to establish willfulness. Plaintiffs' four basic allegations are distilled as follows: (1) Mr. Masteller's pay status was converted from a salary to hourly pay plan, and he was told that he would not be paid for overtime work; (2) employees worked off the clock and were not paid for that time; (3) employees were implicitly and explicitly told that they would not be paid for off-the-clock work; and (4) employees' supervisors knew that they were working off the clock. (*See* Plaintiffs' Statement of Undisputed Facts.)

With regard to Mr. Masteller specifically, the deposition testimony does not support Plaintiffs' alleged "fact." As described in MEI's concurrently-filed Statement of Material Facts in Opposition to Partial Summary Judgment and MEI's Memorandum in Support of Motion to Strike Plaintiffs' Statement of Undisputed Facts (Docket No. 225), the complete testimony of Mr. Masteller actually demonstrates that Mr. Masteller's supervisors never told him to work off

the clock, and, when they discovered he was working overtime and not reporting it, he was reprimanded for doing so. (Masteller Depo. at 48:22-51:4.)[1]

In addition, the allegations that employees worked off the clock and were not paid for that time and that employees were implicitly and explicitly told that they would not be paid for off-the-clock work do not add up to anything. Off-the-clock work is unreported time, and it is hardly noteworthy that Plaintiffs were not compensated for time they failed to report. Furthermore, evidence that some individuals were working off the clock, without more, does not establish an FLSA violation, especially in the collective-action context.

The record clearly reflects that, despite the allegations of certain inside sales representatives regarding working off the clock, there was no MEI policy of encouraging off-the-clock work. First, a number of inside sales representatives in the period from June 1998 to May 31, 2001 acknowledge that none of their supervisors or anyone else in management ever instructed, permitted, or encouraged them not to record all their time worked or to perform work off the clock. (Affidavit of Kim J Dockstader (Filed Under Seal) ("Dockstader Aff.") (Docket No. 125), Exs. A-N ¶ 5 of each affidavit.) Similarly, all of the supervisors deposed have verified that they never told sales representatives to work off the clock. (Statement of Undisputed Facts in Support of Micron Electronics, Inc.'s Cross-Motion for Partial Summary Judgment Re: Willfulness ("SOF") ¶ 8, 10.) In addition, many inside sales representatives in the relevant period testified that they reported and were paid for all the time- overtime or regular- they worked. (*Id.* at ¶ 11.) Still others testified that they never worked off the clock. (*Id.*) Finally,

[1] To avoid overburdening the Court with lengthy citations, all citations to the depositions attached as exhibits to the Omnibus Affidavit of Gregory C. Tollefson in Support of Defendant Micron Electronics, Inc.'s (1) Memorandum in Response to Plaintiffs' Motion for Partial Summary Judgment, (2) Motion to Strike, and (3) Cross-Motion for Partial Summary Judgment Re: Willfulness (the "Omnibus Affidavit") will be cited as, "[Deponent] Depo. Page: Line." All

those individuals who now claim to have worked off the clock did so for a variety of individualized reasons. (*Id.* at ¶ 12.) In sum, the fact that some individuals claim to have worked off the clock does not reflect a common MEI policy or plan in willful violation of the FLSA.

Finally, the allegation that a few employees' supervisors knew that the employees were working off the clock is also insufficient to establish MEI's willful culpability under the FLSA[2] for purposes of applying the three-year statute of limitations. *See Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060, 1080 (1st Cir. 1995); (upholding district court's finding that FLSA violations were not willful for purposes of application of statute of limitations period); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 702-03 (3d Cir. 1994). ((same); "It would be unfair to use evidence that mainly indicates that the [employees] were committed to their jobs as proof of [the employer's] willful violation of the FLSA".)

In *Newspapers of New England*, several employees testified that they were actually instructed by superiors to report no more than 40 hours per week on their time cards, were reprimanded when they occasionally reported overtime, and were told to alter their weekly time cards so that no overtime was included. 44 F.3d at 1067. However, the court did not find a willful violation, because the preponderance of the evidence did not support a finding that the employer acted recklessly (for example, even though the employer had a policy of discouraging overtime, the employer actually paid overtime compensation to those employees who reported overtime). *Id.* at 1080.

Like the employer in *Newspapers of New England*, MEI had a policy of paying for all time reported. In addition, MEI had a policy to discourage off-the-clock work. These policies

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of the depositions cited herein are attached to the Omnibus Affidavit in alphabetical order.

[2] This allegation is also disputed as set forth in Defendant Micron Electronics, Inc.'s Statement of Material Facts in Response to Plaintiffs' Motion for Summary Judgment.

complied with the FLSA. (SOF ¶ 3.) A number of inside sales representatives within the time period from June 1998 to May 31, 2001 have testified that their supervisors and managers expected them to follow MEI's policies and that none of their supervisors or managers ever required or told them to violate any of the policies. (Dockstader Aff., Ex. A ¶ 5 of each affidavit.) Additional evidence that these policies were enforced is reflected in the testimony of Mr. Masteller, who was reprimanded for working off the clock and was told to "go home" at the end of the workday. (Masteller Depo. 48:22-51: 4.) This evidence suggests that, rather than disregarding the FLSA, MEI was doing its best to fulfill its legal duties under the FLSA.

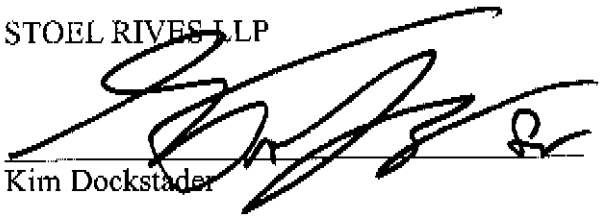
Fundamentally, Plaintiffs have failed to meet their burden of demonstrating any evidence of willfulness- and not for want of opportunity. The initial Complaint was filed over three years ago, discovery has been underway since August 2001, Plaintiffs have taken 16 depositions, Defendant has taken 47 depositions, and over 26,000 documents have been produced by the parties. Furthermore, Plaintiffs have had plenty of opportunities to brief this issue. Plaintiffs could have introduced such evidence in their Opposition to Defendant Micron Electronics, Inc.'s Motion for Partial Summary Judgment Re: Statutes of Limitation or in their present motion for partial summary judgment. Despite these opportunities, Plaintiffs have failed to meet their burden and failed to set forth evidence sufficient to prove that MEI willfully violated the FLSA.

IV. CONCLUSION

In sum, because Plaintiffs have failed to demonstrate how MEI's actions can be characterized as "willful" or "recklessly indifferent," MEI is entitled to summary judgment on the willfulness issue. Therefore, the Court should apply the two-year statutory priod to Plaintiffs' claims as set forth in Defendant Micron Electronics, Inc.'s Motion for Partial Summary Judgment Re: Statutes of Limitations (Docket No. 193).

DATED this 24th day of August, 2004.

STOEL RIVES LLP



Kim Dockstader

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of August, 2004, I caused to be served a true and correct copy of the foregoing **DEFENDANT MICRON ELECTRONICS, INC.'S MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT RE: WILLFULNESS** by the method indicated below, addressed to the following:

William H. Thomas
Daniel E. Williams
Christopher F. Huntley
HUNTLEY PARK LLP
250 South Fifth Street
PO Box 2188
Boise, Idaho 83701-2188
Fax: 208 345 7894

[ ] Via U. S. Mail
[✓] Via Hand-Delivery
[ ] Via Overnight Delivery
[ ] Via Facsimile

Kim Dockstader